IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD G. GROSS Plaintiff, v. AKIN GUMP STRAUSS HAUER & FELD LLP Defendant.	Civil Action No. 07-399 (EGS/JMF)

PLAINTIFF'S MOTION TO COMPEL DISCOVERY

COMES NOW the Plaintiff, Donald G. Gross ("Plaintiff"), by and through his attorneys, and pursuant to Rules 33, 34, and 37 of the Federal Rules of Civil Procedure hereby moves this Honorable Court for an order compelling Defendant Akin Gump Strauss Hauer & Feld LLP ("Defendant" or "Akin Gump") to answer interrogatories and produce documents responsive to Plaintiff's discovery requests.

Plaintiff brings this Motion after engaging in a good faith effort to resolve the discovery disputes in this matter. The parties have succeeded at resolving some of their disputes, but Defendant continues to refuse to produce certain relevant and reasonable discovery. Defendant has produced heavily redacted documents, withheld certain critical information, and provided incomplete answers to Plaintiff's discovery requests, thus rendering a motion to compel necessary.

WHEREFORE, Plaintiff respectfully requests that this Court grant his Motion to Compel Discovery and order Defendant to produce all documents responsive to Plaintiff's discovery requests, to fully answer Plaintiff's interrogatories, and to allow for any further needed discovery concerning the documents heretofore withheld. Plaintiff's Motion is supported by good and substantial authority

in the attached Memorandum of Points and Authorities.

Respectfully Submitted,

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/s/ Jonathan C. Puth

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DISCOVERY

Plaintiff Donald G. Gross files this Motion to Compel after several attempts to resolve informally the refusal by Defendant Akin Gump Strauss Hauer & Feld LLP ("Defendant" or "Akin Gump") to provide responses to several discovery requests propounded by Plaintiff Gross. In this age discrimination case in which Mr. Gross seeks to recover back pay and front pay, Defendant has sharply limited its responses to requests for the very pay information that would help prove the damages in this case. Additionally, while Defendant has produced some documents regarding factual matters at issue, the documents produced are so heavily redacted as to hamper significantly Plaintiff's ability to interpret the documents, even though the parties have agreed to a protective order governing the confidential handling of documents. Plaintiff Gross, therefore, moves to compel responses to the discovery.

Effective October 31, 2004, Akin Gump terminated Plaintiff's employment from his position as Senior Counsel in the Korea Practice Group in Akin Gump's Washington, D.C. office. Mr. Gross' boss, Sukhan Kim, explained to Mr. Gross that he was being terminated because he was "too senior" and therefore "not a good fit" with the firm. (Verified Complaint at ¶29.) Even at the time

of his job interview a year and a half earlier, Mr. Kim had expressed reservations directly to Mr. Gross, stating: "I am very concerned about your age," and "[Y]ou seem very old to be starting out in a major law firm." (*Id*. at ¶10.) Another witness explained to Mr. Gross that age was a "big problem" for Mr. Kim because of the importance of age as a proxy for rank in Korean society, and that Plaintiff Gross was too close in age to his boss and older than a senior partner working in the Korea Practice Group. (*Id*. at ¶¶13-14.)

Mr. Gross brought this action alleging that Akin Gump terminated his employment because of his age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq*. and the District of Columbia Human Rights Act, D.C. Code § 2-1401, *et. seq*. In his complaint, Mr. Gross seeks back pay, front pay, and liquidated damages, along with other damages.

ARGUMENT

The Federal Rules of Civil Procedure contain a liberal standard for civil discovery. Rule 26 provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . ." Fed. R. Civ. P. 26(b)(1). This standard of relevancy is "to be accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). "When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery either does not come within the broad scope of relevance as defined under Fed.R.Civ.P. 26(b)(1) or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Moore v. Chertoff*, 2006 WL 1442447, at *2 (D.D.C. 2006)(internal quotations omitted); *see also Tequila Centinela v. Bacardi & Co.*, 2007 WL 1020785, at *4 (D.D.C. March 29, 2007)("The term relevance at the discovery stage is a broadly construed term and is given very

liberal treatment.") This liberal standard of discovery provided by Rule 26 is particularly important in civil rights actions, where plaintiffs should be granted wide latitude in discovery due to the need to prove discriminatory intent. *See Wards Cove Packing Co. v. Antonio,* 490 U.S. 642, 657-58 (1989)("liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims").

In this case, Plaintiff seeks to obtain discovery concerning his damages, in addition to discovery concerning the factual matters at issue in this case. Defendant resists the discovery based on claims of relevance, but Defendant cannot meet its burden to demonstrate that the information sought is not relevant to Plaintiff's claims. Plaintiff respectfully requests that this Court grant Plaintiff's Motion to Compel.

I. The Court Should Compel Responses to Interrogatories and Requests for Production Seeking Information Concerning Compensation and Mobility.

As note above, Plaintiff Gross alleges that he was terminated because of his age, and not for performance reasons, as Defendant now alleges. A central aspect of relief sought by Plaintiff is back pay and front pay, representing the amount that Plaintiff Gross would have earned had he remained employed by Defendant, minus amounts earned by Plaintiff Gross in the interim. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)(Title VII). Plaintiff further seeks an award of liquidated damages, amounting to an additional award of pay for Defendant's having known or shown reckless disregard for whether its conduct violated the law. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 616-17 (1993).

Plaintiff began working for Akin Gump as Senior Counsel on July 7, 2003 at a rate of $250,000 per year and was terminated effective October 31, 2004. Plaintiff believes that, absent age

discrimination, he would have enjoyed increases in his annual rate of pay and been eligible for bonuses provided to other Senior Counsel and to members of the Korea Practices Group. Plaintiff further believes that in the absence of discrimination he would have had the opportunity to ascend to a partnership position and enjoy the added compensation that comes with such a promotion.

With that in mind, Plaintiff Gross propounded the following discovery calculated to obtain evidence concerning pay and mobility. Defendant's responses are provided below in full:

Interrogatory No. 3: Identify each and every person at Akin Gump from January 1, 2002 until the present who at any time during his or her tenure held the title "Senior Counsel." For each person so identified, please state the date the person was hired, the date his or her tenure with Akin Gump ended, all titles (such as Senior Counsel, Of Counsel, Partner, etc.) held by the person, and the dates any such title(s) were held.

RESPONSE: Defendant objects to this request as overbroad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence in this case.

Interrogatory No. 8: For the time period of January 1, 2002 to the present, state the value and method of calculation of each component of income, expense, benefit, or reimbursement provided to or available to each person holding the Senior Counsel position, including but not limited to those available or provided to Plaintiff, and the amounts paid or available to each Senior Counsel on an annual basis.

RESPONSE: Defendant objects to this request on the basis that it is overbroad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence in this case to the extent it requests information relating to individuals other than Mr. Gross. Defendant directs Plaintiff to Mr. Gross's personnel file (AK 000001-AK000079), W2 tax forms (AK000080-AK 000081), and Akin Gump's Summary of Benefits Senior Counsel, Counsel, Associates, Senior Attorneys and Staff Attorneys (AK 000164- AK 000172), for information relating to his income and benefits.

Interrogatory No. 9: For the time period January 1, 2002 until the present, identify each attorney in the Korea Practice Group. Please include in your response for each the attorney's hire date, termination date, title, salary for each calendar year, and the value of any bonus, gift, or award, provided during each calendar year.

RESPONSE: Defendant objects to this request as overbroad, irrelevant and not

> reasonably calculated to lead to the discovery of admissible evidence in this case to the extent it requests the hire date, termination date, title, salary for each calendar year, and the value of any bonus, gift, or award, provided during each calendar year with respect to each attorney in the Korea practice group from January 1, 2002 until the present. In addition, Defendant objects to this request as vague because the "Korea practice group" is an informal subdivision within Akin Gump. Notwithstanding these objections, Defendant states that the following attorneys did a substantial amount of Korean work during the requested time period: Mr. Kim, Mr. Quigley, Mr. Park, Ms. Park, Thomas C. Hubbard, James K. Lee, and Mr. Gross.

(Ex. 1, Excerpts, Defendant's Objections and Responses to Plaintiff's First Set of Interrogatories, May 14, 2007.)

As shown by Defendant's responses above, Defendant took the initial position that it did not have to identify any individuals who, like Mr. Gross, held the "Senior Counsel" position, and that no compensation information whatsoever would be provided for any other attorneys, whether for Senior Counsel or in the Korea Practice Group. By letters dated May 14, 2007, June 7, 2007, and June 27, 2007, Plaintiff wrote to Defendant noting deficiencies in Defendant's responses and explaining his position regarding the relevance of the requested information. (*See* Ex. 2, Letter from J. Puth to C. Kearns, May 14, 2007; Ex. 3, Letter from J. Puth to C. Kearns, June 7, 2007; Ex. 4, Letter from J. Puth to C. Kearns, June 27, 2007.) Plaintiff also discussed the deficiencies in numerous telephone conferences with Defendant's counsel, including on May 30 and June 21, 2007. Defendant later provided unsworn salary information regarding two attorneys in the Korea Practice Group, and then agreed to supplement its interrogatory responses to provide "Senior Counsel compensation information for Senior Counsel hired from January 1, 2003 to the present" but refused to produce the names of the Senior Counsel or otherwise respond completely to the discovery requests. (*See* Ex. 5, Letter from K. McTavish to J. Puth, June 29, 2007, at 1.)

A. Defendant should be compelled to produce information regrading the mobility of attorneys holding the Senior Counsel position.

Plaintiff's Interrogatory No. 3 is calculated to obtain discovery regarding the mobility of individuals hired by Akin Gump into other positions, such as partner. (*See* Ex. 1.) Specifically, the interrogatory seeks the identity of all individuals employed at Akin Gump since 2002 "who at any time during his or her tenure held the title 'Senior Counsel,'" and further seeks the attorneys' hire date, the titles held, and the dates that the attorney held such titles. (*Id*.) By obtaining such information, Plaintiff would be in a position to present evidence about further economic and advancement opportunities denied him due to the discrimination. As such, the interrogatory is carefully geared to obtain information that would bear upon Mr. Gross' damages in this case.

Defendant refused to respond at all to the interrogatory (*see id*.), and later produced an unsworn response indicating that two attorneys hired as Senior Counsel in just the last three years had been promoted to Partner positions within a short time frame. Otherwise, Defendant has refused to respond to the interrogatory.

Defendant's response and objections to Interrogatory No. 3 on the basis of relevance, overbreadth and burden should be rejected. Defendant has withheld information that would help predict the advancement and compensation potential that Plaintiff could have enjoyed were it not for the discrimination, a subject of obvious relevance to Plaintiff's damages.[1] Moreover, Defendant has not presented an allegation of any specific burden that a complete response would entail, nor has Defendant suggested that some narrower breadth would adequately serve to prove the advancement

[1]Plaintiff plans to engage an expert on the question of back pay, front pay, and advancement, but Defendant has not yet produced data that would enable an expert to predict a range of compensation. (*See* Exs. 3, 4.) The expert designation deadline in this case is currently July 13, 2007. (*See* Scheduling Order, entered April 16, 2007.)

opportunities available to Senior Counsel at Akin Gump. A complete response should be compelled.

B. Defendant should be compelled to produce complete compensation data for Senior Counsel and Korea Practice Group attorneys.

In Interrogatories Nos. 8 and 9, Plaintiff sought compensation information for Senior Counsel and Korea Practice Group attorneys, but Defendant refused initially to provide any responsive information aside from information concerning the compensation provided to Mr. Gross. (*See* Ex. 1.) In Interrogatory No. 8, which seeks compensation information for attorneys in the Senior Counsel position from 2002 until the present, Defendant objected on the basis of relevance, breadth, and burdensomeness, but did not suggest any particular burden presented by the interrogatory. Defendant later agreed to provide anonymous data for a subset of individuals (only those hired after January 1, 2003), but refused to provide any identifying information. (*See* Ex. 5.) Defendant has not yet provided any such data to Plaintiff, despite the impending July 13, 2007 expert designation deadline.

In response to Interrogatory No. 9, which seeks compensation data for attorneys in the Korea Practice Group, Defendant later produced limited and unsworn data regarding salary alone solely for one associate attorney for the years prior to the time he became a partner, and three years of data for a "Senior Advisor" to the Korea Practice Group.[2] Defendant refuses to provide compensation information for any other attorneys identified as practicing in the Korea Practice Group.

As noted above, the interrogatories seek data that would assist in predicting the compensation (whether salary, bonus, gift, etc.), that Mr. Gross would have earned were it not for the intentional discrimination against him. In devising an award of back pay (and by extension liquidated damages

[2]Defendant later agreed to provide bonus and other compensation information for these two individuals, but has not yet done so.

and front pay), a court must, "as nearly as possible, recreate the conditions and relationships that would have been, had there been no unlawful discrimination." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 372 (1977). Consequently, an award of back pay (and liquidated damages and front pay) should be tailored to include the promotions, bonuses, and pay increases Plaintiff would have received were it not for the discrimination, based specifically on compensation and promotions received by comparative employees. *See Hartman v. Wick*, 678 F. Supp. 312, 337 (D.D.C. 1988)(and citing cases). Plaintiff was paid at an annual rate of $250,000 for a 16 month period ending in October 2004, but there is no reason to believe that his compensation would have remained static were it not for the discrimination. The compensation provided to other Senior Counsel and other Korea Practice Group attorneys will provide data from which conclusions on salary growth, bonuses, and other compensation, could reasonably be drawn.

Defendant's suggestion that a subset of data for Senior Counsel is sufficient should be rejected. Defendant proposes to provide some data for individuals *hired* in the Senior Counsel position since 2003, but not for Senior Counsel *employed* in that position since 2002, as requested. In order to obtain a reliable statistical comparison, however, Plaintiff should be entitled to obtain a larger data pool.

Plaintiff also disagrees with Defendant's proposal to provide anonymous data. The parties have agreed to a protective order in this case that would keep strictly confidential the discovery produced in this litigation, and which provides for the destruction of the data following resolution of this matter. More importantly, Plaintiff understands Defendant's position to be that decisions as to salary adjustments, bonuses, and promotions are individualized, and would not necessarily have been available to Plaintiff in the absence of the discriminatory termination. If that is the case, then

shielding the identities of other individuals in the same Senior Counsel position would prevent Plaintiff from inquiring further about the very distinctions that Defendant might wish to advance. If, on the other hand, Defendant would concede that average salary adjustments and promotional opportunities would be the same for Plaintiff as for other Senior Counsel, then Plaintiff would have no objection to the provision of anonymous data.

C. Defendant should be compelled to produce documents regarding the writing abilities of other Korea Practice Group attorneys.

Plaintiff propounded the following Requests for Production of Documents, to which Defendant gave the following responses:

> Request No. 17: If you contend that Plaintiff's writing abilities were deficient in any manner, please produce all documents reflecting or related to the writing abilities of all Korea Practice Group attorneys for the period January 1, 2002 through December 31, 2005.
>
> RESPONSE: Defendant objects to this request on the basis that it is overbroad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence in this case. In addition, Defendant objects to this request because it seeks documents protected by Akin Gump's clients' attorney-client privilege or protected work-product client documents.
>
> Request No. 19: If you contend that Plaintiff's analytical abilities were deficient in any manner, please produce all documents reflecting or related to the analytical abilities of all Korea Practice Group attorneys for the period January 1, 2002 through December 31, 2005.
>
> RESPONSE: Defendant objects to this request on the basis that it is overbroad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence in this case. In addition, Defendant objects to this request because it seeks documents protected by Akin Gump's clients' attorney-client privilege or protected work-product client documents.

Despite requests by Plaintiff to provide these documents, Defendant maintains its objections, calling the requests "ridiculously overbroad." (*See* Ex. 5 at 2.) Plaintiff, however, only seeks documents comparable to those produced by Defendant with respect to Mr. Gross.

The genesis of the dispute concerns Defendant's apparent position that Mr. Gross, a professional writer, was terminated because of his writing skills, while Plaintiff maintains that any criticisms of his writing were overblown to mask intentional and illegal discrimination. Plaintiff contends that drafting of documents within the Korea Practice Group was a collaborative process, with numerous individuals involved in the drafting and editing process, and that each individual attorney, whether Partner, Associate, or Senior Counsel, had his or her work edited by other Partners, Associates, or Senior Counsel on a regular basis.

In this case, Defendant has produced documents drafted and edited by Plaintiff that were also edited by others, and also contends that Plaintiff's work "required redrafting by others." (Ex. 1 at 3.) If Defendant were to concede that the documents produced reflected the typical collaborative drafting process undertaken attorneys in Akin Gump's Korea Practice Group and did not reflect a criticism of Plaintiff's writing skills, then there may be no problem. Plaintiff understands, however, that Defendant takes the position that editing of Plaintiff's work is instead somehow reflective of poor writing skills. In that case, Defendant cannot have it both ways. If Defendant contends that Plaintiff's work required editing or "redrafting," then Plaintiff is entitled to compare how much editing or "redrafting" was required of other attorneys' writing. Therefore, Defendant should be compelled to produce documents responsive to Plaintiff's Request Nos. 17 and 19.

II. The Court Should Compel Production of Unredacted Documents

Defendant recently produced thousands of pages of documents in which large portions of subject matter and individual identities have been redacted. In particular, Defendant redacted identifying information regarding subject matter, individuals, entities, identities of senders and recipients of e-mail, and other substantial information that renders it difficult if not impossible in

some instances to interpret the thousands of pages of discovery produced. All such communications are subject to a protective order agreed to by the parties in this case, and should be produced.

The heavy redactions in the documents produced make it difficult to identify which documents correspond to the discovery requests propounded by the Plaintiff, and Defendant has refused to amend its Responses to identify which documents correspond to particular discovery requests. This has made Plaintiff's review of the 3,300 pages of documents produced so far inefficient and subject to guesswork over the significance of each document.

For instance, Defendant has recently moved to file an amended complaint and counterclaim concerning certain factual matters, and argues for damages against Plaintiff. (*See* Motion to Amend Answer and File Counterclaims, June 25, 2007.) While Plaintiff is able to discern from Defendant's discovery production the documents referred to in Defendant's Motion, the matters at issue involve months and months of prior and subsequent communications documented in Defendant's records that were presumably produced in discovery. Because the entities, individuals, and subject matter of those prior e-mails and documents have been so heavily redacted, however, the relevance of any particular document to the issues advanced in Defendant's motion cannot be discerned upon review. As such, Defendant has unnecessarily and improperly placed Plaintiff at a material disadvantage by depriving Plaintiff of the opportunity to meaningfully review and interpret the discovery.

Defendant's claim that the redacted information is not relevant does not hold water. The redacted information provides the very context and information that renders the documents understandable. If client confidences are the concern, there is a protective order that has been agreed to by the parties in this case that requires the confidential handling of documents. Moreover, Plaintiff Gross was a party to most all the communications at issue, therefore there will be no

compromise of client confidences.

Where parties agree to a protective order, the redaction of documents is inappropriate and unnecessary. *See Kern v. University of Notre Dame Du Lac*, 1997 WL 816518, at *7 (N.D. Ind. 1997)(production of heavily redacted documents, despite a protective order, unfairly deprives receiving party of content, perspective, and understanding of the relevancy of the disclosed information); *see also Peraita v. Don Hattan Chevrolet, Inc.*, 2005 WL 2619533, at *2-3 (D. Kan. 2005)(ordering production of documents in unredacted form). The Court should compel the unredacted production of all documents produced to date, as well as any additional documents Defendant may produce in the future.

III. Duty to Confer Under Local Rule 7

Counsel for Plaintiff has discussed the above discovery issues with counsel for Defendant in telephone conferences on May 30 and June 21, 2007, and by letters dated May 14, 2007, June 7, 2007, and June 27, 2007, seeking Defendant's cooperation in resolving the issues and indicating Plaintiff's intention to file this Motion to Compel. A good faith effort was made to narrow the areas of disagreement, and while some areas have in fact been narrowed, Defendant has refused to fully respond to Plaintiff's discovery requests, making this Motion necessary.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Honorable Court grant his Motion to Compel Discovery.

Respectfully Submitted,

WEBSTER, FREDRICKSON & BRACKSHAW

/s/ Jonathan C. Puth

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ORDER

Upon consideration of Plaintiff's Motion to Compel Discovery, any Opposition thereto, and the entire record herein, it is hereby

ORDERED that the Plaintiff's Motion to Compel Discovery is hereby, **GRANTED;** and it is further

ORDERED that Defendant shall produce within ____ days all documents responsive to Plaintiff's Interrogatory No. 3, 8, and 9, and Request for Production Nos. 17 and 19; and it is further

ORDERED that Defendant shall produce all responsive documents in unredacted form, subject to the parties' agreed protective order where appropriate; and it is further

ORDERED that Plaintiff shall be allowed to conduct further discovery concerning the responsive documents, including taking depositions.

Dated: _____

_____
Judge Emmet G. Sullivan
United States District Court for the District of Columbia

CERTIFICATE OF SERVICE

I hereby certify that on this ***3rd*** day of July, 2007, a copy of the forgoing Motion to Compel Discovery, the Memorandum of Points and Authorities in Support thereof, and draft order was sent by first class mail, postage prepaid, and transmitted electronically to:

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